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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION OF
ARIZONA WATER COMPANY FOR AN
EXTENSION OF THE SERVICE AREA
UNDER ITS EXISTING CERTIFICATE OF
CONVENIENCE AND NECESSITY TO
PROVIDE WATER UTILITY SERVICES.

DOCKET NO. W-01445A-03-0559

STAFF'S REPLY BRIEF**I. INTRODUCTION**

On August 12, 2003, Arizona Water Company ("AWC") filed with the Arizona Corporation Commission ("Commission") an application to extend its Certificate of Convenience and Necessity ("CC&N"). The Commission granted the application subject to compliance with several conditions in Decision No. 66893 (April 6, 2004). Among the conditions was the requirement that AWC provide (1) a certificate of Developer's Assured Water Supply and (2) a main extension agreement for each development inside the CC&N extension territory within 365 days of the issuance of the order. Additionally, Decision No. 66893 ordered that the CC&N would be deemed null and void without further order of the Commission in the event of failure to comply with any condition of the order.

On March 30, 2005, AWC filed an application for an extension of time to comply with the requirements of Decision No. 66893. On April 7, 2005, Cornman Tweedy 560, LLC ("Cornman") filed a letter in this docket indicating its contention that, pursuant to the requirements set in Decision No. 66893, AWC's CC&N extension was automatically null and void. Per the letter, Cornman is a landowner holding more than 1,000 acres in the area. Cornman expressed in the letter its desire to not be within AWC's CC&N and instead had requested water and wastewater service from the Robson Communities affiliated Picacho Water Company and Picacho Sewer Company (collectively "Robson") respectively.

1 By Decision No. 69722 (July 30, 2007), the Commission determined that AWC had complied
2 with the requirements of Decision No. 66893. Decision No. 69722 further remanded the proceeding
3 for further evidentiary findings “for the purpose of considering whether the Cornman property should
4 be deleted from the CC&N extension granted to Arizona Water Company by Decision No. 66893.”
5 Decision No. 69722 at 21.

6 In preparation for additional evidentiary proceedings, parties pre-filed testimony supporting
7 their positions on rehearing. Prefiled testimony provided by AWC largely discussed AWC’s fitness
8 and properness to hold a CC&N. Garfield Remand Direct at 3. Cornman provided testimony that
9 discussed five issues: (1) grant of a CC&N absent evidence of a current need and necessity; (2) grant
10 of a CC&N without a property owner’s request for service; (3) preference of the property owner as to
11 the service provider; (4) desirability of a single service provider for a development versus multiple
12 service providers; and (5) the advantages of integrated water and wastewater services over stand
13 alone service. Poulos Remand Direct at 9.

14 Due to witness health issues, evidentiary proceedings have been set aside by procedural order
15 and the matter has progressed directly to briefs. In its opening brief, Cornman indicated the
16 following issues in support of its exclusion from the CC&N (1) the public interest favors approving
17 an integrated water and wastewater utility when there is a need and necessity and a request for
18 service; (2) that there is no current need and necessity for water service; (3) the preference of the
19 property owner in the face of no request for service; (4) the public interest is not served by AWC
20 continuing to hold a CC&N for the Cornman property; and (5) that the scope of remand is broad.

21 **II. ARGUMENT**

22 As Commission Utilities Division Staff (“Staff”) indicated in its Pre-Hearing Brief and
23 Response to Arizona Water Company’s Motion to Strike filed on February 15, 2008, Decision No.
24 69722 confirmed that AWC had complied with all requirements to obtain the CC&N extension
25 conditionally granted by Decision No. 66893. The character of a proceeding to determine whether
26 AWC should continue to hold that CC&N is thus going to be a deletion rather than an examination
27 whether the extension should be granted. The available case law makes clear that this is a distinction
28 that makes a difference as to the legal issue of the appropriate scope of the proceeding.

1 To the extent that various facts may demonstrate the reasonableness of deleting a CC&N,
2 Staff does not believe that the facts presented by Cornman are sufficiently compelling to justify
3 deletion of AWC's CC&N. The five grounds cited by Cornman substantially discuss considerations
4 that are relevant to a new CC&N grant determination, but do not bear on the appropriateness of a
5 CC&N deletion. Thus, the request has not articulated proper reasons to delete the Cornman property
6 from the existing CC&N.

7 **A. The conditional grant of CC&N has been perfected into a complete grant.**

8 Decision No. 69722 ordered that the conditions on which the CC&N extension in Decision
9 No. 66893 was granted to AWC would be deemed satisfied. Decision No. 69722 at 20.
10 Consequently, AWC is in possession of a complete CC&N for the area that includes the Cornman
11 property. Additionally, Decision No. 69722 returned the matter to the Hearing Division for further
12 proceedings whether AWC should continue to hold a CC&N for the Cornman property. The decision
13 went on to explicitly notice AWC that the character of the remand proceedings would be for
14 consideration of potential deletion of a portion of the CC&N extension that was granted. *Id* at 21.

15 The Arizona Supreme Court explored the circumstances in which an existing CC&N may be
16 deleted in *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 671 P.2d 404 (Ariz.
17 1983). In *James P. Paul*, the Pinnacle Paradise Water Company ("Pinnacle") requested the deletion
18 of a portion from James P. Paul Water Company's ("Paul") neighboring CC&N and the addition of
19 that area to Pinnacle's CC&N. Although Paul possessed a CC&N for the area at issue, Pinnacle had
20 facilities closer in proximity to the area as Paul had not received any demands for service for that
21 area. *Id.* at 430, 671 P.2d at 408.

22 The Court evaluated the Commission's authority to delete a CC&N and separately the Court
23 considered the Commission's authority to grant a new CC&N by way of the requested reassignment.
24 *Id.* at 428, 671 P.2d at 406. In either circumstance, the public interest is the controlling interest. *Id.*
25 With respect to deletion proceedings, the Court recognized that the benefit of a CC&N to the holder
26 is a right to provide the certificated monopoly service provided that it can deliver adequate service at
27 a reasonable rate.

28 ...

1 If a certificate of convenience and necessity within our system means anything, it
2 means that its holder has the right to an opportunity to adequately provide the service
3 it was certified to provide. Only upon a showing that a certificate holder, presented
4 with a demand for service which is reasonable in light of projected need, has failed to
5 supply such service at a reasonable cost to customers, can the Commission alter its
6 certificate. Only then would it be in the public interest to do so.

7 *Id.* at 429, 671 P.2d at 407. In support of the conclusion, the Court explained that treating a CC&N
8 otherwise would undermine the public interest in the monopoly utility system designed by the
9 legislature; encourage over-extensive development of facilities by CC&N holders; not adequately
10 reward CC&N holders for the regulatory obligations concomitant to a CC&N monopoly; and, it
11 would be a disincentive for utilities to provide service in less profitable territories. *Id.* at 429-30, 671
12 P.2d at 407-08.

13 In the instant case, Cornman requests deletion from AWC's CC&N and has specified among
14 the bases for the request, the advantages of an integrated water-wastewater utility, absence of a
15 present need or request for service and that the public interest is not served by AWC holding the
16 particular CC&N. Most of these grounds may generally be described as arguments that the CC&N
17 should not have been granted in the first instance. To that extent, *James P. Paul* suggests that is not
18 an adequate justification for a CC&N deletion.

19 In its order, the Commission implies that its initial grant of the certificate of
20 convenience and necessity to Paul for the subject area was inappropriate because it
21 was granted before there was 'public need and necessity for that certificate.' Though
22 this may help explain the Commission's [decision to delete the CC&N], it does not
23 justify the Commission's decision.

24 *Id.* at FN3 137 Ariz. at 429, 671 P.2d at 407. Clearly, it is insufficient to support deletion on the
25 grounds that it should not have been granted at the outset.

26 As a more specific basis for deleting the CC&N, Cornman contends that there is no *bona fide*
27 request for service for the Cornman property. Cornman relies on the assertion of a predecessor in
28 interest to one portion of the Cornman property, the Dermer Family Trust, that it was not properly
29 notified of the AWC application. Cornman Initial Brief at 12-13 citing letter from Dermer Family
30 Trust dated April 21, 2004, docketed on April 22, 2004; Poulos Remand Direct Testimony at 7:28-
31 8:8. AWC witness Bill Garfield, however, testified that notice was properly mailed to the address of
32 record for the property owner. Garfield Rebuttal at 4:18-24. In either event, the process issue

1 notwithstanding, the deletion issue is what importance should be given to the absence of a need for
2 service.

3 *James P. Paul* considered the significance that a lack of a present need or request for service
4 might have in a deletion context. The Court's conclusion was that the absence of a specified need for
5 service for a particular segment of a CC&N is irrelevant; the CC&N holder has a right to provide
6 service until it is demonstrated that the CC&N holder will not or cannot provide adequate service at a
7 reasonable rate. *Id.* at 430, 671 P.2d at 408. As *James P. Paul* makes abundantly apparent, lack of
8 need for service, while relevant to an initial CC&N, is not a basis for deletion of an existing CC&N.

9 **B. The bases Cornman raises for deleting the CC&N relate to considerations**
10 **relevant in considering the appropriateness of an initial grant, not for deletion of**
an existing CC&N.

11 The other, implicit aspect of Cornman's arguments to the effect that the CC&N was
12 prematurely granted is that AWC is not as aptly suited to provide service as Cornman's preferred
13 affiliate provider, Robson. *See e.g.*, Letter dated April 7, 2005 from Cornman; Poulos Remand Direct
14 at 7. In that vein, Cornman's alternative arguments largely emphasize the hypothetical merits of a
15 competing provider for the same CC&N territory. These arguments focus on the benefits of an
16 integrated water-wastewater provider. *See* Cornman Initial Brief at 7-11.

17 In determining the appropriateness of an initial CC&N, the public interest inquiry is broader
18 than for a deletion proceeding.

19 Where a request for a certificate of convenience and necessity is made in the first
20 instance, the public interest is determined by comparing the capabilities and
21 qualifications of competitors vying for the exclusive right to provide the relevant
22 service. The amounts of time and money that competitors must spend (at consumers'
ultimate expense) to provide service become primary determinants of the public
interest.

23 *James P. Paul* at 430, 671 P.2d at 408. An integrated water-wastewater provider presents a wide
24 range of benefits and the Commission has recognized this by awarding initial CC&Ns to integrated
25 utilities in the face of competing applications by stand-alone water providers before. *See e.g.*,
26 Decision No. 68453 (February 2, 2006).

27 However, hypothetical alternatives that present arguably more preferable utility service
28 providers, when viewed in hindsight, are not an appropriate basis to conclude that deletion of a

1 CC&N is reasonably in the public interest. AWC holds a CC&N for the area. Decision No. 69722.
2 Consequently, *James P. Paul* directs the discussion to whether AWC is willing and able to provide
3 adequate service at reasonable rates. *James P. Paul* at 429, 671 P.2d at 407. As AWC witness Bill
4 Garfield has testified, AWC is willing and able to provide water service to the Cornman property.
5 Garfield Remand Direct at 4-7; Garfield Remand Rebuttal at 5, 8, 11.

6 Cornman has also indicated that several public interest considerations argue against
7 permitting AWC holding a CC&N for the Cornman property. Among these issues are the splitting of
8 a development between two different utility providers, foreclosing integrated utilities as a future
9 alternative, and the Commission's routine denial of CC&N extensions absent a request for service.
10 Cornman Brief at 14-15. As with the consideration of the benefits of integrated utility service, these
11 are arguments that go to the appropriateness of an initial CC&N grant, not to the reasonableness of
12 deleting an existing CC&N.

13 To that point, Cornman suggests that Staff has already indicated a willingness to consider the
14 changed circumstances of AWC while awaiting an extension on compliance requirements of the then
15 conditional CC&N. *Id.* at 15-17. Cornman contends that just as Staff performed its due diligence
16 and considered the material facts surrounding AWC's request for extension in providing an
17 appropriate recommendation, changed circumstances since the initial grant of CC&N that were the
18 basis for the remand should also be evaluated.

19 On the contrary, Staff's consideration of the changed circumstances, specifically the
20 expressed wishes of the property owner, was relevant because the CC&N was only conditional at that
21 point. More significantly, while the changed circumstances cited by Cornman may have bearing in
22 the context of determining the reasonableness of an initial CC&N, they are not material to the
23 determination whether to delete a CC&N even if they do express public interest bases not to grant a
24 CC&N extension. "A system which did not provide certificate holders with an opportunity to
25 provide adequate service at reasonable rates before deletion of a certificated area could be made
26 would be antithetical to the public interest...." *James P. Paul* at 429, 671 P.2d at 407. Clearly *James*
27 *P. Paul* has already established the public interest inquiry for deletion of a CC&N.

28 ...

1 C. AWC is fit and proper to hold a CC&N.

2 Cornman's final argument focuses on the breadth of the scope of the remand that the
3 Commission desired and that it is not confined to whether AWC is fit and proper as AWC suggests.
4 Cornman Brief at 17-18 citing Garfield Remand Direct at 3. Specifically, Cornman contends that
5 because the Commission has already determined that AWC is fit and proper to hold a CC&N that it
6 would be inconsistent of the Commission to remand the proceeding for further findings as to whether
7 AWC is fit and proper. Decision No. 69722 is clear that the scope of the remand is to consider the
8 appropriateness of a deletion.

9 It is further ordered that Arizona Water Company is hereby on notice that the
10 Commission's subsequent *proceeding on remand will be for the purpose of*
11 *considering whether the Cornman property should be deleted from the CC&N*
extension granted to Arizona Water Company by Decision No. 66893.

12 Decision No. 69722 at 21 (emphasis provided). The Commission has expressly declared that the
13 scope of the proceeding contemplates what is relevant to a deletion. Contrary to the desires of
14 Cornman, *James P. Paul* frames the analysis for a deletion in specific terms, however.

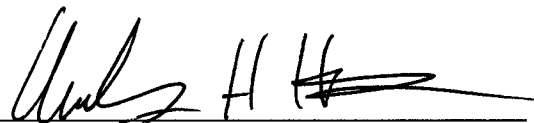
15 The necessary outcome of pursuing the matter from the perspective of a deletion is that it
16 functionally narrows the considerations to essentially two inquiries. The first which has been already
17 discussed is whether the incumbent CC&N holder has refused or is unable to provide adequate
18 service within the CC&N at reasonable rates. The second is an evaluation whether it is appropriate
19 for the CC&N holder to possess *any* CC&N. Whereas the first inquiry is the *James P. Paul*
20 requirement, the latter inquiry goes to the fitness and properness of the CC&N holder to continue
21 providing service.

22 Cornman has not argued or provided evidence to suggest that AWC is not fit and proper to
23 hold a CC&N. By expressing its arguments for deletion in terms specific only to the property they
24 own, Cornman implicitly agrees that AWC is otherwise ably suited to providing water utility service,
25 at least for any property other than Cornman's. Rather, Cornman has more or less conceded that
26 AWC is fit and proper to hold a CC&N. Cornman Brief at 18:8-11 quoting Poulos Remand Rebuttal
27 at 2-3. Thus the only remaining avenue open to Cornman on which to obtain a deletion of the AWC
28 CC&N other than the method prescribed by *James P. Paul* likely will not succeed.

1 **III. CONCLUSION**

2 For all the above stated reasons, Staff believes that the scope of the remand is a deletion
3 proceeding and is governed by a standard that requires AWC receive an opportunity to demonstrate
4 the willingness and ability to provide adequate service at reasonable rates before deletion of the
5 CC&N granted by Decision Nos. 66893 and 69722.

6 RESPECTFULLY submitted this 19th day of June, 2009.

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